

DECLARING THAT THE UNITED STATES HOLDS CERTAIN LANDS IN TRUST FOR THE MAKAH INDIAN TRIBE, WASHINGTON

APRIL 18, 1984.—Ordered to be printedFiled under authority of the order of the Senate on April 13 (legislative day, March 26), 1984

Mr. ANDREWS, from the Select Committee on Indian Affairs,
submitted the following

REPORT

[To accompany S. 2468]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2468) to declare that the United States holds certain lands in trust for the Makah Indian Tribe, Washington, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of S. 2468 is to transfer in trust to the United States for the benefit of the Makah Tribe of Washington two islands—Tatoosh and Waadah—located off the coast of the present Makah Indian Reservation on the Olympic Peninsula in the State of Washington. The two islands comprise approximately 80 acres of land.

BACKGROUND

The Makah Indian Reservation is located at the extreme northwest tip of the continental United States on the Olympic Peninsula in the State of Washington and consists of approximately 25,000 acres. The Makah Indian Tribe is a federally recognized tribe numbering approximately 1,200 members.

Tatoosh Island lies a half mile offshore of Cape Flattery, at the entrance of the Strait of Juan de Fuca. Tatoosh consists of a main island, comprising 21 acres, and a group of islets, rocks and reefs comprising an additional 26 acres. English explorer, John Meares,

named the island in June 1778, after visiting Makah Chief Tooche on the island. The island was the site of a large Makah village and served as a base for the whale, seal and halibut fisheries, the base of the Makah economy.

Waadah Island comprises 34.22 acres and is located at the entrance to Neah Bay, directly offshore from Neah Bay village, where most Makahs reside. It is connected to the mainland by a long breakwater, and was once inhabited by the Makahs, who maintained some dikes around the island as tidal impounding traps to harvest fish.

In 1855, Governor Isaac Stevens went to Neah Bay to negotiate a treaty with the Makahs, in an attempt to extinguish the Indian title to the portion of the Olympic Peninsula occupied by the Makahs. The treaty describes the area ceded by the tribe, which encompassed some 124,000 acres, as including " * * * all the islands lying off the same on the straits and coast." The treaty was ratified by the Senate on March 8, 1859, and proclaimed by the President the following month.

From 1855 to the present, the tribe has insisted that they had no understanding that their offshore islands were included in the land ceded to the United States. At the time of the treaty negotiation, none of the Makahs present were able to read and write English and their understanding of the terms of the treaty was dependent on the oral explanations made to them by the government representatives of the treaty party. The official records of the treaty proceedings do not indicate that cession of the offshore islands was discussed.

In the latter part of the 19th century, the two islands were made Federal reservations for the purpose of establishing a lifesaving station on Waadah Island and a lighthouse on Tatoosh Island. The islands, now, are all but abandoned. While the Coast Guard continues to lease the lands from the Bureau of Land Management, the lighthouse has been replaced by an automated signal light and fog horn, powered by a submarine cable from the mainland, and the lifesaving station on Waadah Island has been abandoned.

The U.S. Coast Guard has no objection to the proposed transfer of the islands to the tribes, as long as the legislation protects the Guard's ability to maintain, replace, expand and construct its facilities, including aids to navigation. S. 2468, subsection (c), addresses this concern, and the Coast Guard agrees that the language properly protects its access and use of the islands.

The Makah Tribal Council has enacted two tribal resolutions addressing the Coast Guard's access and use of Tatoosh Island and public visitor access to both islands. The resolutions read as follows:

Resolution No. 140-83.

Date enacted: July 15, 1983.

Subject matter: Resolution of Tatoosh & Wa'adah Island to Makah ownership.

RESOLUTION NO. 140-83 OF THE MAKAH TRIBAL COUNCIL

Whereas the Makah Tribal Council is the governing body of the Makah Tribe, an Indian chartered corporation as defined in the Reorganization Act of June 18, 1934; and

Whereas the Makah people reside in the area of Cape Flattery which has been their home for over 2,000 years; and

Whereas the Makah Tribe seeks restoration of Tatoosh and Waadah Islands to Makah ownership by legislation which would make them part of the Makah Indian Reservation; and

Whereas the U.S. Coast Guard maintains navigational aids on Tatoosh Island, which includes a lighthouse, fog horn, electrical generating equipment and other navigational facilities; and

Whereas the Makah Tribe is desirous of insuring that those navigational aids and associated facilities and equipment remain fully operational and be maintained and/or improved by the U.S. Coast Guard; and

Whereas the Makah Tribe wishes to maintain its harmonious relation with the Coast Guard similar to the manner in which it has accommodated other military and public uses of lands of the Makah Reservation: Now, therefore, be it

Resolved, that the policy of the Makah Tribe regarding the use of Tatoosh and Wa'adah Islands is as follows:

1. The Makah Tribe will not permit any use of Tatoosh Island which will conflict with the operation and maintenance of Coast Guard navigational aids, facilities and associated equipment. The Makah Tribe will cooperatively consult with the Coast Guard from time to time so as to ensure that the purpose of this resolution is carried out.

2. Tatoosh and Wa'adah Islands shall be dedicated to the use of the Makah people, provided that such use is consistent with the restriction which is declared in this resolution; and be it further

Resolved, that the tribe is willing that this declaration of policy regarding the use of Tatoosh Island be incorporated in the legislative history of any act or resolution of Congress placing Tatoosh Island in trust for the Makah Tribe.

Provided, however, that nothing in such act or resolution shall impair the basic status of Tatoosh Island as Indian reservation land, held in trust by the United States for the benefit of the Makah Indian Tribe, and subject to its tribal jurisdiction.

MAKAH TRIBAL COUNCIL,

_____,
Vice Chairman.
DONALD W. JOHNSON,
Chairman.

CERTIFICATION

The foregoing resolution was adopted at a special meeting held on July 15, 1983, at which a quorum was present, and the resolution was adopted by a vote of 3 for and 0 against, the chairman or the vice chairman in his absence, being authorized to sign the resolution.

RUTH WILLIAMS,
Acting Tribal Secretary.

Resolution No. 80-84.

Date Enacted: March 7, 1984.

Subject matter: Land use policy re Tatoosh and Wa'adah Islands.

RESOLUTION NO. 80-84 OF THE MAKAH TRIBAL COUNCIL

Whereas the Makah Tribal Council is the governing body of the Makah Tribe, an Indian chartered corporation as defined in the Reorganization Act of June 18, 1934; and

Whereas the Makah Indian Tribe has petitioned the U.S. Congress for legislation restoring to the Makah Tribe Tatoosh and Wa'adah Islands; and

Whereas H.R. 3376 would establish these islands as part of the Makah Indian Reservation; and

Whereas the Makah Tribal Council deems it necessary and proper to establish a land-use policy concerning these islands: Now therefore be it

Resolved, That the Makah Indian Tribe does hereby declare that all uses of Tatoosh and Waadah Islands shall be in conformity with the following principles and guides:

1. The islands shall be part of the historic homeland of the Makah people of Cape Flattery and shall have the same status as other parts of the Makah Reservation, including the main reservation and the Ozette area of the Makah Reservation.

2. The Makah Tribe will extend its traditional hospitality to visitors and nonmembers who may desire to visit these islands.

3. Visitation shall be subject to tribal regulation for purposes of public safety, conservation, protection of sea and bird life and prevention of interference with Coast Guard navigational aids.

4. The Makah Tribe, in keeping with Resolution No. 140-83, enacted July 15, 1983, will not permit any use of Tatoosh Island which will conflict with the operation and maintenance of Coast Guard navigational aids, facilities and associated equipment and will cooperatively consult with the U.S. Coast Guard to insure that the purpose of that resolution is carried out: Be it further

Resolved, That the Makah Tribal Council is desirous that this resolution be incorporated in the legislative history of H.R. 3376.

MAKAH TRIBAL COUNCIL,
GEORGE BOWECHOP,
Chairman.

CERTIFICATION

The foregoing resolution was adopted at a meeting held on March 7, 1984, at which a quorum was present, and the resolution was adopted by a vote of 3 for and 0 against, the chairman or the vice chairman in his absence, being authorized to sign the resolution.

JO DEAN HAUPT,
Tribal Secretary.

The committee notes that the resolutions assure the public of reasonable access to the islands and protects the Coast Guard's access to the islands.

The current Federal uses being made of Tatoosh and Waadah Islands are not in any way inconsistent with the transfer of the islands to the Makah Tribe. This restoration to the Makahs would leave the United States in full control of its Coast Guard's installation on Tatoosh Island and, at the same time, would return to the tribe the islands taken in 1855 by the United States without the understanding or apparent consent of the tribe.

The committee is aware that the administration, in its report on the bill, stated that although it did not have any objections to the transfer of the islands to the tribe, it believed that the transfer could and

should be accomplished administratively pursuant to the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701) (FLPMA). Under FLPMA, land has to be sold at the fair market value and, usually, the sale has to be made by competitive bidding. There are serious questions whether, in actuality, these islands could be sold to the tribe under FLPMA.

FLPMA requires that land can be sold only if identified for sale pursuant to an approved land use plan. These islands are not selected for sale as part of a comprehensive land planning process and there is no evidence that there is a land use plan in existence in this area. Second, FLPMA's regulations prohibit the sale of unsurveyed public lands and require approval of the survey by the Secretary of the Interior prior to any sale. There are no such surveys of these islands. Lastly, under FLPMA, sales are to be made by competitive bidding. Although the Act allows the Secretary to waive this requirement in certain cases, there is no evidence that this waiver could clearly be made in this case.

Because of all the above-mentioned uncertainties, the committee does not accept the administration's suggestion that the transfer of these islands be made pursuant to FLPMA.

LEGISLATIVE HISTORY

S. 2468 was introduced by Senators Gorton and Evans on March 22 (legislative day, March 19), 1984. S. 2468 is identical to H.R. 3376, introduced by Congressman Swift on June 21, 1983, and referred to the House Committee on Interior and Insular Affairs. After a hearing on the bill, the House Committee, by voice vote, recommended enactment of H.R. 3376, without amendment. On November 18, 1983, H.R. 3376 passed the House of Representatives. The Senate received H.R. 3376 on November 18 (legislative day, November 14), 1983, and the bill was referred to the Senate Select Committee on Indian Affairs. The Select Committee on Indian Affairs held a hearing on H.R. 3376 on March 15, 1984.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Select Committee on Indian Affairs, in open business session on April 9, 1984, with a quorum present, recommends by a unanimous vote that the Senate pass S. 2468.

SECTION-BY-SECTION ANALYSIS

The bill has only one section with four subsections. Subsection (a) provides that all right, title and interest of the United States in Waadah and Tatoosh Islands are declared to be held in trust by the United States for the Makah Indian Tribe and that such islands be part of the Makah Indian Reservation.

Subsection (b) is a land description of the islands. Subsection (c) provides that nothing in the bill shall deprive the United States of any right to use or expand any Coast Guard facility on the island, but it is stipulated that if the U.S. Coast Guard ceases, at any time, to use or have any need for these facilities, then the reservation of any right under this subsection will terminate.

Subsection (d) provides that nothing in this bill will enlarge, impair or affect any existing fishing rights of the Makah Indian Tribe.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 2468, as provided by the Congressional Budget Office, is outlined below:

CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., April 12, 1984.

HON. MARK ANDREWS,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Hart Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 2468, a bill to declare that the United States holds certain lands in trust for the Makah Indian Tribe, Washington, as ordered reported by the Senate Select Committee on Indian Affairs, April 9, 1984.

The Congressional Budget Office has determined that enactment of this bill would not result in any significant costs to either the Federal Government or State and local governments in the area. The bill would transfer title to approximately 80 acres of Federal land to the Makah Tribe in the State of Washington. According to the Department of the Interior, estimates of the value of the land range from \$15,000 to \$35,000.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER,
Director.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The committee believes that S. 2468 will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The pertinent communication received by the committee from the Department of the Interior is set forth below:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D.C., March 22, 1984.

HON. MARK ANDREWS,
*Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: This responds to your request for our views on H.R. 3376, an act "To declare that the United States holds certain lands in trust for the Makah Indian Tribe, Washington."

We have no objection to transfer of the lands described in H.R. 3376, however, we believe that the transfer can and should be accomplished administratively. Therefore, we do not recommend enactment of H.R. 3376.

H.R. 3376 would declare that two small uninhabited federally owned islands lying just off the coast of the present Makah Indian Reserva-

tion, known as Tatoosh Island and Waadah Island, be held in trust by the United States for the Makah Indian Tribe of Washington and that these lands be made part of the Makah Indian Reservation.

H.R. 3376 would provide that the United States would not be deprived of any right to use, occupy, maintain, replace, expand, or construct any Coast Guard facility on either of the two islands, including any aid to navigation and access to any such aid to navigation. The act would also provide that these rights shall terminate upon notification by the Secretary of Transportation (or the Secretary of Defense when the Coast Guard is operating as a service in the Navy) that these facilities are no longer needed by the U.S. Coast Guard.

Finally, H.R. 3376 would provide that no existing fishing right of the Makah Indian Tribe shall be enlarged, impaired, or otherwise be affected by this legislation.

BACKGROUND

The Makah Indian Reservation includes approximately 27,000 acres and is located at the extreme northwest tip of the contiguous United States on the Olympic Peninsula in the State of Washington. In addition, the 719 acres of the former Ozette Indian Reservation were declared to be held in trust for the Makah Tribe by the act of October 22, 1970 (Public Law 91-489).

The Makahs are a seagoing, fishing people. At the time the United States entered into a treaty with them in 1855, they resided in five principal villages in the Cape Flattery area: Boada, Neah, Waatch, Sooes, and Ozette. During the summer months, they also resided on Tatoosh and Waadah Islands.

Tatoosh Island is one-half mile offshore of Cape Flattery at the entrance to the Strait of Juan de Fuca. The Island actually consists of a main island of 21 acres, and a group of islets, rocks, and reefs totaling approximately 26 additional acres.

Waadah Island, totaling 34.22 acres, is at the entrance to Neah Bay, directly offshore from the Village of Neah Bay, where most Makahs reside today. Estimates of the total value of the two islands range from \$15,000 to \$35,000.

Tatoosh Island was named by the English explorer John Meares in June 1788, after visiting Makah Chief Tatooche on the Island. It was the site of a large Makah Village with a flourishing population and served as a base for the whale, seal and halibut fisheries on which the Makah economy was based. There were substantial houses on the island as well as extensive drying racks for halibut. It was also a Makah burial ground and is known to contain many Makah gravesites.

The Makahs also resided on Waadah Island. The Makahs maintained stone dikes at various sites around the island, which they used as tidal impounding traps to harvest fish.

The first Federal treaty with the Makah Indians was concluded at Neah Bay on January 31, 1855 (12 Stat. 939). In this Treaty the Makahs ceded their tribal land to the United States in consideration of the establishment of the original Makah Reservation, a small portion of Cape Flattery, which for some unknown reason, did not include any of the village sites. Four of the villages—Sooes, Waatch, Neah, and Baada—were added to the reservation by Executive

orders on October 26, 1872, January 2, 1873, and October 21, 1873. The fifth village, Ozette, was established as the Ozette Reservation by Executive order on April 12, 1893. It was declared to be held in trust for the tribe by the act of October 22, 1970.

The treaty negotiations were recorded and minutes kept by an official member of the treaty party. The minutes disclose that the main emphasis of the negotiations was on persuading the Makahs to cede their lands. The treaty itself contains a description of the boundaries of the lands ceded to the United States and ends with this phrase: " * * * including all the islands lying off the same on the straits and coast," thereby excluding the islands from the Makah reservation. Thus, the Makah Tribe has no legal claim to the islands.

RECOMMENDATIONS

We would not object to a sale of the islands to the Makah Tribe. Sales of public lands must meet the conditions of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701). Under FLPMA a sale could be negotiated after a determination of the fair market value of the islands. We also believe that the islands can then be transferred to the United States to be held in trust. Currently, the islands are used by the U.S. Coast Guard for the placement of navigational devices. There are no other plans within the Federal Government for usage of the islands. Moreover, the islands are isolated from other Federal lands and are difficult to manage and monitor. We believe that transfer of the islands would be the best beneficial use of the property as long as the U.S. Coast Guard retains its rights to the island.

The tribe wishes to obtain the islands for economic, religious, and cultural reasons. A harbor and fishery utilizing Waadah Island are in the planning stages. Religious and cultural ceremonies are currently carried out on the islands. The tribe wishes to control access to these ceremonies, which it believes are best conducted privately for religious purposes.

We support the transfer of Waadah and Tatoosh Islands to the Makah Tribe, but we believe that this can be best accomplished by a sale of the islands under existing law. Therefore, we must oppose enactment of H.R. 3376.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

KENNETH L. SMITH,
Assistant Secretary.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the committee notes that no changes in existing law are made by S. 2468.